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9 *Attorneys for Plaintiff Clifford Miller*

10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 CLIFFORD W. MILLER

Case No. 3:17-cv-0068-MMD-WCG

13 Plaintiff,

14 **UNOPPOSED MOTION**  
15 **TO MODIFY PRETRIAL ORDER**  
(Fed.R.Civ.P. 16(e))

16 vs.

Bench Trial Date: March 28, 2022  
Time: 9:00 a.m.

17 ROMEO ARANAS, et al.,

Jury Trial date: April 4, 2022  
Time: 9:00 a.m.

18 Defendants.

19 /

20 **I. MODIFICATION OF THE PRETRIAL ORDER**

21 “Under Rule 16(e) of the Federal Rules of Civil Procedure, the district court has authority to  
22 modify a pretrial order if, in the court’s discretion, the modification is necessary to prevent manifest  
23 injustice.” *United States v. First National Bank of Circle*, 652 F.2d 882, 887 (9<sup>th</sup> Cir. 1981). For a court  
24 to properly exercise its discretion to modify the order, it must consider such factors as: (1) the degree of  
25 prejudice to the plaintiff resulting from a failure to modify; (2) the degree of prejudice to defendant from  
26 a modification; (3) the impact of a modification at this stage of the litigation on the orderly and efficient  
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conduct of the case; and (4) the degree of willfulness, bad faith, or inexcusable neglect on the part of the moving party. *Olivier v. Union Pacific*, 862 F.2d 318 (9<sup>th</sup> Cir. 1988).

## **II. MODIFICATIONS REQUESTED**

### **A. Modification To Include Additional Injunctive Relief In Plaintiff's Retaliation Claim**

In the JPO, Plaintiff Miller requested only the removal of Plaintiff's discipline from his NDOC record in his retaliation claim. To align NDOC's policy with the PLRA's grievance mandate, Plaintiff seeks to add an additional item of injunctive relief: An order directing NDOC to clarify when and under what circumstances an inmate must administratively exhaust an ADA claim when he has previously exhausted a medical claim. Therefore, should Plaintiff Miller prevail on this claim, he would move this Court for such an order.

There is an inescapable conflict between the law and NDOC grievance policies which must be modified to avoid manifest injustice. By challenging the retaliation claim, NDOC makes clear it has no intention of resolving this conflict and other inmates will likely suffer the same fate as Miller foreseeably will suffer again because of this conflict. Miller is an inmate who is serving a life sentence. He has a disability – blindness in one-eye – that involves conditions of confinement and utilization of medical services. It is foreseeable that in the course of his incarceration, he will need again to grieve matters that involve both his constitutional rights and the ADA. His ability to do so will be chilled by the continuation of NDOC's policy promising discipline for following the PLRA's legal mandate.

In 2017, when Miller filed his federal lawsuit, he alleged only a § 1983 action. In 2019, Miller sought to add an ADA claim. Miller read the law requiring exhaustion of all claims brought under all federal laws. Miller was aware that *O'Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1061 (9<sup>th</sup> Cir. 2007) held that suits brought under the ADA, or any other Federal law, must be exhausted pursuant to the Prison Litigation Reform Act ("PLRA"):

Nothing in the ADA or the Rehabilitation Act carves out an exception to the PLRA

1 exhaustion requirement. On the other hand, the PLRA specifically prohibits suits ‘under  
2 section 1983 of this title or any other Federal law.’ 42 U.S.C. §1997e(a), absent  
3 exhaustion.” See *Salgado v. Garcia*, 384 F. 3d 769, 773-74 (9<sup>th</sup> Cir. 2004). The Supreme  
4 Court has noted that in enacting the PLRA Congress intended it to apply to all federal  
laws with respect to prisoner suits, with the intent that prison officials would have the  
first opportunity to address prison conditions.” (Emp. added).

5 Miller was in an impossible Catch-22 position, damned if he filed an ADA grievance and  
6 damned if he didn’t. Miller filed an ADA grievance to begin the exhaustion process on what would be  
7 his ADA claim. Miller was promptly disciplined. NDOC asserted Miller had abused the grievance  
8 process because his 2016 grievance was the same as his 2016 grievance, duplicative and thus subject to  
9 discipline. Yet as Judge Cobb noted, if Plaintiff had not attempted to exhaust his ADA claim, his ADA  
10 claim was subject to a dismissal or summary judgment for failure to exhaust. (ECF No. 99, 14 at 11-16).

11 By following the law as mandated in the PLRA, Miller brought discipline upon himself for  
12 failing to follow NDOC rules. This conflict between the PLRA and NDPC rules cannot be allowed to  
13 stand. Miller and other inmates will be harmed if it is permitted to stand.  
14

15 The issue is made more complex by the October 14, 2019 grievance response by Warden  
16 Wickham affirming Miller’s discipline: “The NDOC grievance process does not make a distinction  
17 between a medical complaint or ADA complaint.” Maybe so, but federal law does in fact make such a  
18 distinction. In federal court an ADA claim is vastly different than a § 1983 claim, with different  
19 elements, defenses, and proof requirements. Adding further confusion, NDOC’s grievance policy  
20 mandates “one issue” only per grievance. Had Plaintiff brought up an ADA claim and a medical claim,  
21 asking for different relief, in the same grievance, he would again be subjected to discipline. Court  
22 intervention is respectfully requested to avoid the manifest injustice this confusion creates. NDOC will  
23 not be prejudiced by this modification; NDOC has been on notice of this Catch-22 situation as the  
24 parties have addressed this issue in all pleadings. There is no issue of bad faith or inexcusable neglect.  
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27 **B. Modification to Include Additional Injunctive Relief In Plaintiff’s ADA Claim**  
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1 Plaintiff respectfully requests the JPO be modified to include a Court order that the “one good  
2 eye policy,” Medical Directive (“M.D.”) 123.03, be modified or eliminated, should he prevail in this  
3 action. It was held to be the “paradigm of deliberate indifference” in the *Colwell v. Bannister* case. The  
4 Ninth Circuit soundly rebuked NDOC for its “one good eye policy” yet the policy continues in full force  
5 to this day.

6  
7 As matters stand, if Miller were to secure a jury verdict in his favor on his ADA claim, NDOC  
8 would remain free to not remove, modify, or amend, MD 123.03 – just as it failed to do following the  
9 Ninth Circuit’s decision in *Colwell v. Bannister*. This Court has noted that “M.D. 123.03 is essentially a  
10 ‘one good eye policy’ because an inmate is not eligible for cataract surgery if he or she has a normal  
11 visual acuity in one eye.” (ECF 109, 5 at 1-3).

12 This “one good eye policy” violates U.S. Code § 12182(2)(A) because it imposes an “eligibility  
13 criteria that screens out or tends to screen out an individual with a disability” from enjoying the services,  
14 facilities, privileges, advantages that nondisabled persons enjoy. It is facially discriminatory because an  
15 inmate with monocular blindness, like Miller, who is disabled, will be precluded from cataract  
16 consideration on the basis of his disability. If Miller had two bad eyes – whether disabled or not – M.D.  
17 123 would permit him to have surgery; but if he has “one good eye” he cannot. Miller’s disability  
18 precludes him from consideration for cataract surgery when, under this policy, nondisabled inmates  
19 without blindness in either eye are candidates for cataract surgery. That is a facially discriminatory  
20 policy on the basis of Miller’s disability.

21  
22 For all of these reasons Miller respectfully requests that he be permitted to modify his relief  
23 request to include not only damages for intentional discrimination, but also an order that NDOC modify  
24 or eliminate M.D. 123.03. Such an order would prevent manifest injustice and future discrimination  
25 against inmates disabled with monocular blindness who still have one good eye. This JPO modification  
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1 will not prejudice NDOC as Miller has put this topic at issue in all his pleadings. There is no issue of  
2 bad faith or inexcusable neglect.

3 **III. CONCLUSION AND CERTIFICATION**

4 Miller respectfully requests the JPO filed in this matter, (ECF No. 123) be modified to add the  
5 two above mentioned claims for relief to avoid manifest injustice.  
6

7 DATED: This 7th day of December 2021.

8 /s/ Terri Keyser-Cooper

9 TERRI KEYSER-COOPER  
10 DIANE K. VAILLANCOURT  
11 *Attorneys for Plaintiff Miller*

12  
13 **IT IS SO ORDERED:**

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15  
16 THE HONORABLE MIRANDA DU  
17 UNITED STATES DISTRICT JUDGE

18 DATED: December 7, 2021  
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**DECLARATION OF ATTORNEY DIANE K. VAILLANCOURT**

I, Diane K. Vaillancourt, am an attorney licensed to practice law in the State of Nevada and am one of the attorneys of record representing Plaintiff Miller in the above-entitled matter.

1. On Friday, November 26, 2021, my colleague Terri Keyser-Cooper emailed the above “Motion to Modify Pretrial Order” to defense counsel Rands to see if he would agree to it and permit plaintiff’s counsel to file the motion as unopposed. I was copied with this email.

2. On Monday, December 6, 2021, defense counsel Rands wrote Ms. Keyser-Cooper and myself a return email agreeing to the motion being filed as unopposed with certain suggested changes.

3. On this date, I returned defense counsel Rands’ email agreeing to the suggested changes and confirming that I would file the motion as unopposed.

4. I incorporated the suggested changes verbatim into the motion and adjusted the title of the motion to alert the Court to the fact that the motion is unopposed.

I declare under penalty of perjury that the foregoing is true and correct, except as to the matters stated on information and belief, and as to those matters, I believe them to be true.

DATED: December 7, 2021

/s/ Diane K. Vaillancourt

Diane K. Vaillancourt

LAW OFFICE OF DIANE K. VAILLANCOURT

**CERTIFICATE OF SERVICE**

I, Diane K. Vaillancourt, declare as follows:

I am over the age of 18 years and not a party to this action. My business address is 849 Almar Ave., Ste. C403, Santa Cruz, CA 95060.

On this date, I served a copy of the following documents on the parties in this action as follows:

**UNOPPOSED MOTION TO MODIFY RELIEF REQUESTED IN JPO**

☐ BY UNITED STATES MAIL. By placing a true copy of the above-referenced document(s) in the United States Mail in a sealed envelope with postage prepaid to the addressee(s) listed below.

☐ BY FACSIMILE TRANSMISSION. By transmitting a true copy of the document(s) by facsimile transmission

☐ BY HAND-DELIVERY. By delivering a true copy enclosed in a sealed envelope to the address(es) shown below.

☒ BY ELECTRONIC SERVICE. By electronically mailing a true copy of the document(s) to defendants at the following email addresses via the Court's electronic filing procedure:

AARON D. FORD  
Attorney General  
DOUGLAS R. RANDS  
Senior Deputy Attorney General  
State of Nevada  
100 N. Carson Street  
Carson City, Nevada 89701

I declare under penalty of perjury that the foregoing is true and correct.

DATED: December 7, 2021.

/s/ Diane K. Vaillancourt  
DIANE K. VAILLANCOURT